FILED BY CLERK
FEB -8 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2011-0148
	DEPARTMENT A
SANDRA RUIZ ALDERETE,	
	MEMORANDUM DECISION
Petitioner/Appellee,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
ESTEBAN ALDERETE,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100DO200600728

Honorable Theresa Ratliff, Judge Pro Tempore

AFFIRMED

Ritter Law Group, L.L.C.
By Matthew A. Ritter
Florence
Attorney for Respondent/Appellant

H O W A R D, Chief Judge.

¶1 Appellant Esteban Alderete appeals from the trial court's denial of his motion to set aside the entry of a default separation decree in his marriage to appellee Sandra Ruiz Alderete. On appeal, Esteban argues the trial court erred by refusing to set

aside the decree because there had been fraud on the court and other reasons justify relief. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Sandra filed a petition for legal separation with minor children in June 2006. Esteban was personally served with the petition and related documents at his "usual place of abode" in Casa Grande. After hearings that both Sandra and Esteban attended, the trial court issued a temporary order for spousal maintenance and child support. Copies of the minute entries from the hearings and the order were sent to Esteban at the same address in Casa Grande. Esteban never filed an answer to the petition.

¶3 Sandra filed an application for entry of default three times and in two of them certified she had served Esteban by mail, having sent them to the same address. In November 2007, the trial court entered a default decree of legal separation with children, ordering Esteban to pay Sandra spousal maintenance for 16.5 years as well as child support. In January 2009, Esteban filed a petition to modify child custody and support. After a hearing, at which both Esteban and Sandra appeared, the court dismissed the petition. In June 2011, Esteban filed a motion to set aside the default decree, which the court denied. Esteban appealed.[1]

[1]Sandra has not filed a responsive brief in this court. We could, in our discretion, treat this failure as a confession of error if Esteban had raised any debatable issues. *See McDowell Mtn. Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, ¶ 13, 165 P.3d 667, 670 (App. 2007). However, Esteban has raised no debatable issues, and the trial court decided correctly, *cf. Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994) (no reversal for implied confession of error when court correctly applied statute).

Discussion

¶4 Esteban argues the trial court erred by denying his motion to set aside the decree because of fraud upon the court under Rule 85(C)(3), Ariz. R. Fam. Law P., and "any other reason justifying relief from the operation of the judgment" under Rule 85(C)(1)(f). We review a trial court's denial of a motion to set aside a default judgment for an abuse of discretion. *Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 7, 994 P.2d 1030, 1033 (App. 2000); *see* Ariz. R. Fam. Law P. 1 cmt. (case law interpreting other rules applies to family law rules if language substantially the same), 85 cmt. (rule based on Rule 60, Ariz. R. Civ. P.). And "[w]e will uphold the trial court if it is correct for any reason." *Link v. Pima County*, 193 Ariz. 336, ¶ 12, 972 P.2d 669, 673 (App. 1998).

¶5 Esteban did not raise an argument based on Rule 85(C)(1)(f) in his motion to set aside the decree, therefore, he has waived that issue for appeal. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) ("arguments not made at the trial court cannot be asserted on appeal"); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (giving trial court opportunity to rule reason to require party to make specific objection first in trial court before appellant claims error in this court).

Therefore, we will not treat Sandra's failure to respond as a confession of error. *See State ex rel. McDougall v. Superior Court*, 174 Ariz. 450, 452, 850 P.2d 688, 690 (App. 1993) (if party satisfied with record on appeal "should be permitted to forego submitting an answering brief").

¶6 Esteban argues he is entitled to relief from the decree based on fraud and that Rule 85(C)(3) excepts fraud claims from the six-month time limit in Rule 85(C)(2). Subsection (C)(3) states that Rule 85 "does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." Esteban filed a motion to set aside the default decree in the same proceeding three and a half years after the original decree, rather than bringing an independent action. *See Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, ¶ 22, 224 P.3d 950, 956 (App. 2010) (Rule 60(c) motion not independent action for fraud upon court). Such motions must be brought within six months of the entry of the judgment or order. Ariz. R. Fam. Law P. 85(C)(1)(c), (C)(2). Therefore, any motion alleging fraud would fall under Rule 85(C)(1)(c) and would be untimely under subsection (C)(2). The trial court did not err by refusing to set aside the separation decree under Rule 85(C)(3).

Conclusion

¶7 For the foregoing reasons, we affirm the trial court's ruling.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge